

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

MAIL BRANCH

OCT 14 1988

IN REPLY REFER TO:

OCT 27 1988

8920-MW

signed by  
mailed by  
Paul R. Corts, President  
Wingate College  
Wingate, North Carolina 28174-0157

RECEIVED BY  
OCT 26 1988  
MAIL BRANCH

South Carolina Radio Fellowship  
3213 Huxley Drive  
Augusta, Georgia 30909

Fayetteville State University  
1200 Murchinson Road  
Fayetteville, North Carolina 28301

In re: New, Wingate College  
Wingate, North Carolina  
BPED-851108MA

New, Florence, South Carolina  
South Carolina Radio Fellowship  
ARN-860808MB

WFSS(FM), Fayetteville, North Carolina  
Fayetteville State University  
BPED-860811MF

Dear Applicants:

This letter is in reference to: (i) the application of Wingate College ("Wingate") for a new noncommercial educational FM station on Channel 220C2 in Wingate, North Carolina;<sup>1</sup> (ii) the application of South Carolina Radio Fellowship ("SCRF") for a new noncommercial educational FM station on Channel 219C2 for Florence, South Carolina, which was returned by letter of June 26, 1987 and for which a petition for reconsideration was filed on July 24, 1987; and (iii) the application of Fayetteville State University ("WFSS") for a "major change" of the licensed facilities of its station, WFSS(FM), Fayetteville, North Carolina.<sup>2</sup>

The Wingate application was filed pursuant to an "A" cut-off list, generated by the acceptance of an application for Monroe, North Carolina, which established November 8, 1985 as the last day for filing mutually

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1 The application is mutually exclusive with those of Columbia Bible College Broadcasting Co. (BPED-850618ME) and Inspirational Deliverance Center, Inc. (BPED-851108MB), both on Channel 220C2 and both for Monroe, North Carolina.

2 WFSS(FM) proposes to change from Channel 216 (91.1 MHz) to Channel 220 (91.9 MHz).

exclusive applications. See Report No. A-101, released October 8, 1985. The application itself was accepted and put on a "B" cut-off list which established August 29, 1986 as the last day for filing minor amendments as of right. See Report No. B-75, released July 29, 1986. On August 28, 1986, the day before the "B" date, Wingate filed an amendment changing its transmitter location, power, and antenna height. This amendment caused mutual exclusivity between Wingate and both the SCRF and WFSS applications. Neither the SCRF nor WFSS application was filed prior to the November 8, 1985 filing deadline for applicants mutually exclusive with the Wingate application, and on June 26, 1987, the SCRF application was returned. No action has yet been taken on the WFSS application.

In its petition for reconsideration, SCRF argues that: (i) it was aware of the Monroe/Wingate proceeding and thus was careful to protect Wingate's application and avoid mutual exclusivity when it filed its application; and (ii) it submitted its application prior to the submission of Wingate's amendment. Therefore, SCRF states that its application should be reinstated nunc pro tunc and returned to the processing line.

The SCRF application was returned pursuant to the policy stated in Kittyhawk Broadcasting Corp.,<sup>3</sup> because of its mutual exclusivity with the Wingate application, which necessitated that the application be filed by the "A" date in the Monroe/Wingate proceeding, November 8, 1985. That policy, known as the Kittyhawk doctrine, holds that an application will be considered timely for purposes of the cut-off rule only when it is timely filed with respect to the lead application of a group of conflicting applications.

In Kittyhawk, the intervening "daisy chain" was caused by the filing of a mutually exclusive application which the Commission held the returned applicant should have foreseen. Here, the mutual exclusivity between Wingate and both SCRF and WFSS was caused by Wingate's (albeit timely) technical amendment. Both SCRF and WFSS clearly protected all Monroe/Wingate applicants as originally filed and cut-off; thus, these two applicants anticipated the very possibility which the Ellettsville applicant in Kittyhawk did not. When no intervening application was filed, SCRF and WFSS later filed their respective applications. While the Kittyhawk doctrine is necessary to insure

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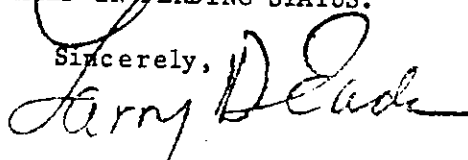
3 In Kittyhawk Broadcasting Corp., 7 FCC 2d 153 (1967), appeal dismissed sub nom. Cook, Inc. v. U.S., 394 F.2d 84 (7th Cir. 1968), an application for a new AM station at Kettering, Ohio, was cut-off on August 17, 1965. On that date, an application for a new AM station at Bloomington, Indiana, was filed which was mutually exclusive with the Kettering application. Subsequently, an application for a new AM station at Ellettsville, Indiana was filed which, although not directly in conflict with the Kettering application, was directly in conflict with the Bloomington application and was thus indirectly interlinked, or "daisy chained," into mutual exclusivity with the Kettering proposal. The Commission concluded that the Ellettsville application should have therefore been filed by Kettering's cut-off date. Accordingly, the Ellettsville application was returned as untimely.

finality in "daisy chain" proceedings, we are both hesitant to extend it to situations where the mutual exclusivity was caused by later amendment and unaware of any prior case in which we have so held. We do not believe that the "amendment as of right" privilege accorded by our processing rules should allow a cut-off mutually exclusive group of applicants to be enlarged after the "A" cut-off date. Such a course of action would thus undercut "finality," the very essence of the cut-off processing system. We therefore conclude that the amendment as of right period will not be permitted to unfairly prejudice prior-filed applicants who could not have foreseen the connecting amendment.

The Mass Media Bureau has traditionally, to the extent possible, extended the AM processing rules and policies to noncommercial educational FM applicants, since both services are licensed on a "demand" rather than a channel-allocation basis. Hence, the Commission applies the Kittyhawk doctrine to noncommercial educational FM applications. See, e.g., Nazarene Theological Seminary Radio Corp., 52 RR 2d 559 (1982). Furthermore, applications for both of these services are subject to the "cut-off" processing procedure rather than the "window" system adopted for processing commercial FM applications. Given this policy, we must point out that 47 C.F.R. § 73.3571(j)(1) indicates that an engineering amendment will result in the assignment of a new file number to the underlying AM application "unless such amendment is accompanied by complete engineering study showing that the amendment would not involve new or increased interference problems with existing stations or other applications pending at the time the amendment is filed." (emphasis added). The Bureau believes that the principle embodied in Section 73.3571(j)(1) is applicable in the present case, as it both emphasizes and serves to insure "finality" for processing purposes. Therefore, we will not accept the August 28, 1986 amendment, and the Wingate application will revert to its status prior to the filing of that amendment.

Accordingly, the August 28, 1986 amendment filed by Wingate IS DISMISSED, and its application IS REINSTATED to its status prior to that date. Additionally, the petition for reconsideration filed on July 24, 1987 by SCRF IS GRANTED and the application IS REINSTATED IN PENDING STATUS.

Sincerely,



Larry D. Eads, Chief  
Audio Services Division  
Mass Media Bureau

cc: Columbia Bible College Broadcasting Co.  
Inspirational Deliverance Center, Inc.  
Gary Smithwick, Esq.  
Stephen Simpson, Esq.